86-1795

No.

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In the Supreme Court of the United States

October Term, 1986

ROBERT J. KONDRAT,
Petitioner,

vs.

BARRY M. BYRON, MELVIN G. SCHAEFER AND GEORGE KRAINCIC,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

ROBERT J. KONDRAT, *Pro Se*
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Willoughby Hills, Ohio 44092
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QUESTIONS PRESENTED

1. Must attorneys fees be paid to persons who knowingly and deliberately commit perjury which is the cause for litigation that otherwise would not have been initiated had the perjury not been committed?
2. May a federal appeals court declare a suit frivolous without consideration for the facts and evidence?
3. Is perjury a criminal offense in the federal judicial system?

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OPINIONS OF THE COURTS BELOW

The February 23, 1987 Opinion of the United States Court of Appeals for the Sixth Circuit is reproduced at page A1 of the Appendix hereto. The July 9, 1984 Order, and the Memorandum and Order; and the June 25, 1985 Order of the United States District Court for the Northern District of Ohio, Eastern Division are reproduced at pages A4-A15 of the Appendix hereto.

JURISDICTION

The jurisdiction of this court is invoked pursuant to the Constitution of the United States, Article III, The Judicial Power, Section 2, second paragraph, which in part states "the Supreme Court shall have appellate jurisdiction, both as to law and to *fact*". Emphasis added.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VII:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner sought several times to have the Respondents enforce laws that would prohibit a business and nuisance on residentially zoned property. The Respondents refused to act. Exercising the constitutional right under the First Amendment, the Petitioner petitioned to recall the Respondents in 1976. As retribution, and to prevent another recall, the Respondents fabricated criminal activity against the Petitioner. Petitioner was arrested, incarcerated and made to stand trial. The trial exposed

the Respondents' fabricated criminal scheme and the fabricated crimes charged against the Petitioner were dismissed.

In 1977, due to the Respondents' non-enforcement of the laws, Petitioner's property was devalued by the county taxing district. Petitioner sought damages from the city by bringing action in the state courts. The Respondents prevailed. In 1983, Petitioner's property was devalued a second time due to the Respondents' non-enforcement of the laws. Again the Petitioner sought damages from the Respondents in the state courts.

After the second property devaluation, the Petitioner filed a complaint in the federal court for the deprival of civil rights as a result of the Respondents' discriminatory practices and unconstitutional actions. Petitioner asked that the Respondents be ordered to enforce the laws to halt further property devaluation, and that judgment be awarded for damages.

During the pleadings in the above three civil suits, the Respondents either denied Petitioner's allegations, or submitted affidavits to the effect that Respondents had not failed to enforce the laws; that they had not worked in concert in refusing to enforce the laws; and that no prosecution for violations was warranted. See App. p. A16.

However, in September and November of 1986, the Respondents changed their story and admitted to the fact that they had known of the existence of the business and nuisance as had been alleged by the Petitioner for over ten years. The Respondents also admitted that they had knowledge of the conditions for over ten years. These admissions came in the courtroom of a federal judge in Cleveland, Ohio, and in the presence of witnesses. See

App. pp. A18-A19. Also, Petitioner learned for the first time that the city had brought action seeking to abate the nuisance and prohibit it from operating a commercial establishment. This action had been unknown to Petitioner and was not instituted until February, 1986, nearly ten years after the Petitioner's exercise of the First Amendment. See App. p. A20. The Respondents' admissions confirmed what the Petitioner had been alleging for over ten years.

In compliance with instructions of the Sixth Circuit Court of Appeals for additional arguments in the captioned case, the Petitioner pleaded, and submitted evidence, to the fact that the Respondents admitted to the Petitioner's allegations. Petitioner pleaded that prior to the Respondents' admissions, the Respondents knowingly lied and submitted false evidence in the form of an affidavit to deceive the court into believing that conditions as alleged were non-existent. Petitioner pleaded that the Respondents' deliberate perjury had squandered judicial resources; had caused Petitioner tremendous expense by subjecting him to needless litigation over a ten year period; and that it had taken years out of Petitioner's, and his children's, lives.

The Sixth Circuit Court of Appeals affirmed the district court's decision by citing and stating that Petitioner's action was in bad faith, vexatiously, wantonly, or for oppressive reasons, unreasonable, or without foundation, and frivolous. The decision further stated that "the suit marked the third time that Kondrat brought suit on this subject matter, and that uncounselled plaintiff who brings meritless suits must be held accountable. Kondrat has reached this point." See App. p. A3.

REASONS FOR GRANTING THE WRIT

Introduction

The opinion of the Court of Appeals below dealt with three issues: (1) That the Petitioner's action was *frivolous;* (2) That the suit marked the *third time* that the Petitioner had brought suit on this subject matter; and (3) That *"uncounselled plaintiff"* who persistently brings frivolous and meritless suits must be held accountable. Emphasis added.

Issue No. 1 - Frivolous Suits

The Petitioner was arrested, jailed and made to stand trial on fabricated criminal activity. Petitioner had committed the heinous crime of petitioning local government for a redress of grievances because of non-enforcement of the law. Such treatment of the Petitioner is not a frivolous matter. The Petitioner's property was devalued not once, but twice, because of the Respondents' refusal to enforce the law. Each time the Petitioner sought relief. The Court of Appeals below considered such suits brought by the Petitioner as frivolous. The Petitioner does not view the loss of property, which Petitioner had worked for all his life, as a frivolous matter. The Petitioner brought a civil rights action suit for discriminatory practices. Despite the fact that the Respondents admitted to the truth of Petitioner's allegations, and despite the fact that perjury had been committed to conceal the truth of Petitioner's allegations, the Court of Appeals below considered Petitioner's action as frivolous. If the Petitioner can be arrested, jailed and made to stand trial on fabricated perjury, it would appear that those who knowingly and deliberately commit perjury should be treated no less. Yet,

the Court of Appeals below disregarded the perjury, admissions, and other evidence in the record to label Petitioner's action as frivolous.

Issue No. 2 - Three Times

It's not clear what the Court of Appeals below meant when it said that the suit marked the third time. Petitioner can only assume that it is referring to the two actions brought in the state courts for the two property devaluations, and the civil rights action brought in the federal court. Just assuming that if the three suits were of the same subject matter, as the Court of Appeals below contends, it is not an uncommon practice to pursue the same litigation in both the state court and in the federal court.

However, the litigation is not the same. One state court action was for one property devaluation, and another for the second devaluation by the taxing district. The Petitioner has the right to seek relief for each loss. If prohibited, then what's to prevent the confiscation of all property by a piecemeal tactic that leaves Petitioner without recourse.

The action in the federal court was a civil rights action for discriminatory practices. The Respondents did not uniformly enforce the laws in the community. They knowingly and deliberately permitted a nuisance and commercial operation to exist where not permitted. They admitted that they had known of its existence for over ten years. But not until February of 1986 did the Respondents take steps to abate the problem. Prior to 1986, the Respondents denied the problem's existence causing Petitioner to be drawn into a recall of city officials and subsequent endless litigation.

Two different property devaluations and a civil rights suit are of different subject matter or different occurrences. The three cannot be considered the same, as the Court of Appeals below has indicated.

Issue No. 3 - Uncounselled Plaintiff

Apparently the Court of Appeals below considers that because Petitioner was acting pro se that it was a decision dictated by the Petitioner. Nothing could be further from the truth. Petitioner will put in proper perspective the pro se role.

At the outset of the recall litigation, Petitioner obtained the finest constitutional lawyer available in the Cleveland area. He eagerly accepted the case and was well paid. He indicated that the case was a very good one. However, a few days after accepting, appearing visibly nervous and shaken, he withdrew from the case. The abrupt change was mystifying at the time. Petitioner sought other counsel. Those contacted were reluctant to take on the case, indicating that their profession could be placed in jeopardy because of the personalities and issues involved. The handwriting was on the wall. Because of fear of reprisal, securing adequate counsel was made difficult.

This was the biggest mistake the legal profession could have made, denying Petitioner the right to counsel. Had Petitioner been permitted legal counsel, without fear of the consequences to others, the litigation would have run its normal course and would have been over a long time ago. However, this was not the case.

Faced with the fact that competent counsel could not be had, Petitioner was left with a choice. He could forget

the whole thing or go pro se. The decision was a difficult one from the standpoint that Petitioner knew no law, knew nothing about the courts and their procedures, and was not a member of the profession. Furthermore, Petitioner recognized the fact that such an undertaking could take a lifetime.

Because the events were such that they affected not only the Petitioner and his children, but affected every American, the Petitioner could not in his heart let the events be buried. To do so would be to endanger the Petitioner's children and all Americans to the oppression of governmental officials which the Petitioner was exposed to and had been made to endure. The die was cast, not by the Petitioner, but by officials in government, and their legal representatives who by using the judicial system sought to suppress the abuses of government.

For the Court of Appeals below to say that "*uncounselled plaintiff* who persistently brings frivolous and meritless suits must be held accountable", is not an accurate statement. It was not the Petitioner's desire to be uncounselled. It was the pressure exerted by governmental legal forces upon members of its own community that drove the Petitioner to be uncounselled. Petitioner's *persistency* is not one of bringing frivolous and meritless suits. Petitioner's persistency is one of justice.

CONCLUSION

The Sixth Circuit's decision in this case completely evaded the evidence. The Respondents' confession, perjury and facts relative to the nuisance and unlawful operation were never considered, nor was Petitioner granted the opportunity of a trial to establish the appropriateness of the complaint. The decision by the Court of Appeals below was designed to destroy Petitioner's pursuit for justice through financial ruin. Over ten years ago, legal representation was made difficult for Petitioner to obtain. The Petitioner has had to go it alone. Through the years the Petitioner has been compelled to litigate because of the Respondents' perjurious activity in the courts. Although the Petitioner was made to stand trial on fabricated crimes of perjury, the Court of Appeals below did not consider the Respondents' deliberate perjury a criminal offense. And, the district court indicated that perjury was not a crime. It would appear that the scales of justice are not balanced.

The Petitioner Robert J. Kondrat respectfully prays that this court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to examine the important issues raised.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed February 23, 1987)

MANDATE OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Issued March 17, 1987)

No. 85-3530

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

ROBERT KONDRAT,
Plaintiff-Appellant,

v.

BARRY M. BYRON; MELVIN G. SCHAFER AND GEORGE KRAINCIC,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: KENNEDY, JONES and NORRIS, *Circuit Judges.*

PER CURIAM. Plaintiff Robert J. Kondrat appeals *pro se* from the district court's order awarding the defendants in this action $3,602.40 in attorney's fees. We affirm.

Kondrat, a resident of Willoughby Hills, Ohio, filed suit on July 21, 1983, against Barry M. Byron, Melvin G. Schafer, and George Kraincic, three city officials, alleging that they had failed to enforce certain zoning ordinances, thereby causing his property to be devalued. Kondrat sought $300,000 in damages for violation of his due process and equal protection rights. He also raised pendent state law claims. On July 9, 1984, the district court dismissed Kondrat's suit. The order was affirmed by this court on April 17, 1985.

On July 19, 1984, the defendants filed a motion for an award of attorney's fees pursuant to 42 U.S.C. § 1988 (1982). Shortly thereafter, Kondrat counterclaimed for attorney's fees. The district court stayed consideration of these motions pending this court's resolution of Kondrat's appeal. On July 25, 1985, following this court's affirmance of the order dismissing Kondrat's claim, Judge Aldrich issued an order awarding the defendants $3,602.40 in attorney's fees. Kondrat now appeals this order, asserting that the defendants are not entitled to attorney's fees.

The general rule in the United States is that in the absence of legislation to the contrary, litigants must pay their own attorney's fees. *See Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 245 (1975). Thus, a prevailing litigant ordinarily is not entitled to recover atttorney's fees from his adversary. *Id.* at 247. However, courts do have the inherent power to allow attorney's fees to a prevailing party in certain situations, unless

prevented from doing so by Congress. *Id.* at 258-59. One such situation is where the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . ." *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974) (citing *Vaughan v. Atkinson*, 369 U.S. 527 (1962)). *See also Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.")

In the instant case, the district court awarded attorney's fees to the defendants after finding that Kondrat's action was frivolous. This finding is amply supported by the record. This suit marked the third time that Kondrat had brought suit on this subject matter. On every occasion, the defendants prevailed. Although we do realize that Kondrat has been acting *pro se* and "attorney's fees should rarely be awarded against such plaintiffs," *Hughes v. Rowe*, 449 U.S. 5, 15 (1980), there comes a point when even the uncounselled plaintiff who persistently brings frivolous and meritless suits must be held accountable. Kondrat has reached this point.

Therefore, the judgment of the district court is AFFIRMED.

A True Copy

Attest:

JOHN P. HEHMAN, *Clerk*
By /s/ GARY MCCARTHY
Deputy Clerk

ISSUED AS MANDATE: March 17, 1987

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed June 25, 1985)

Civil Action No. C83-2953

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT J. KONDRAT,
Plaintiff,

vs.

BARRY M. BYRON, *et al.*,
Defendants.

ORDER

ALDRICH, *J.*

In this civil rights action, this Court previously has granted defendants' motion for summary judgment, *see* Memorandum and Order of July 9, 1984, and their motion for attorneys' fees under 42 U.S.C. §1988. *See* Order of September 6, 1984. After defense counsel submitted an appropriate affidavit, this Court delayed a determination of the amount of fees to be awarded until resolution of plaintiff's appeal. The Sixth Circuit has now affirmed this Court's ruling, *Kondrat v. Byron*, No. 84-3624 (6th Cir. April 17, 1985) (per curiam), and the request for attorney's fees is ripe for ruling.

On consideration, this Court finds that defendants' request satisfies the criteria set forth in *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980); *Louisville Black Police Officers Organization v. City of Louisville,* 700 F.2d 268 (6th Cir. 1983); *Hensley v. Eckerhart,* 461 U.S. 424 (1983); and *Blum v. Stenson,* ..... U.S. ....., 104 S.Ct. 1541 (1984). Accordingly, plaintiff Robert J. Kondrat is ordered to pay to defense counsel fees in the amount of $3,602.40.

IT IS SO ORDERED.

/s/ ANN ALDRICH

United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed July 9, 1984)

Civil Action Number C 83-2953

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT J. KONDRAT,
Plaintiff,

vs.

BARRY M. BYRON, *et al.*,
Defendants.

ORDER

The court has filed its memorandum and order granting the defendants' motion for summary judgment. Therefore, pursuant to Rule 58, Federal Rules of Civil Procedure,

IT IS ORDERED that the complaint is hereby dismissed with prejudice, at plaintiff's costs.

/s/ ANN ALDRICH
U.S. District Judge

MEMORANDUM AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed July 9, 1984)

Civil Action No. C83-2953

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT J. KONDRAT,
Plaintiff,

vs.

BARRY M. BYRON, *et al.*,
Defendant.

MEMORANDUM AND ORDER

ALDRICH, *J.*

Robert J. Kondrat, acting without an attorney, is suing several officials of the City of Willoughby Hills in a third attempt to compel the City to enforce a Willoughby Hills zoning ordinance, Chapter 1337.02, and to halt alleged damage to Kondrat's property. Kondrat also seeks $300,000 in damages for alleged violations of the Fourteenth Amendment's due process and equal protection clauses.

Construing Kondrat's complaint liberally under *Haines v. Kerner*, 404 U.S. 519, *reh'g denied*, 405 U.S. 948 (1972), this Court recognizes that a properly framed complaint

also would have alleged a cause of action under 42 U.S.C. §1983[1] and would have invoked jurisdiction under 28 U.S.C. §§1331 and 1343 and the doctrine of pendent jurisdiction.

Pending before the Court is a Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 filed on behalf of defendants Barry M. Byron, George Krainsic, and Melvin C. Schaefer, who are Law Director, City Council member and Mayor of the City of Willoughby Hills, respectively, ("Willoughby Officials"). They also seek equitable relief in the form of an order barring Kondrat from filing further *pro se* actions without first obtaining leave of this Court. The primary questions in this case are whether the doctrines of res judicata and collateral estoppel, along with adequate state court remedies bar Kondrat from bringing this action. Upon consideration, the Motion for Summary Judgment is granted and the Motion for Equitable Relief is denied.

FACTS

For purposes of the motion for summary judgment, the factual allegations of the complaint will be regarded as true, *Conley v. Gibson*, 335 U.S. 41, 45-46 (1957); *Westlake v. Lucas*, 537 F.2d, 857, 858 (6th Cir. 1976). The allegations are that Kondrat owns property in Willoughby Hills which has twice been devalued by the Lake County Auditor. The alleged cause of the devaluation is the

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1. Title 42 U.S.C. §1983 provides:

"Every person who, under color of statute, ordinance, regulation, custom, or usage, or any State . . . subjects, or causes to be subjected any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

current city administration's refusal to enforce a local zoning ordinance that "prohibits conditions which deteriorate or debase the appearance of a neighborhood, or reduce property values." As a result, Kondrat contends, a "junkyard" has been allowed to exist in his neighborhood.

This is, however, not the first time that Kondrat has brought an action attempting to enforce the zoning ordinance and recover damages. In fact, this is the third in a series of related actions. The first, brought in the Court of Common Pleas of Lake County, *Kondrat v. City of Willoughby Hills*, No. 80-CIV-1263 (Jan. 22, 1982) named the City of Willoughby Hills as defendant. Finding governmental immunity, no actionable violation of the zoning ordinance, no evidence of property devaluation for the period of 1976 to 1979, and no genuine issue for trial, the trial court granted the City's motion for summary judgment. On appeal, Kondrat chose to argue that the judicial officer who assigned his case was biased. The State Court of Appeals found no support for his argument and upheld the trial court's interpretation of the law, *Kondrat*, No. CA 0-069. (Aug. 30, 1982). Kondrat's motion to certify the record was overruled *sua sponte* by the Ohio Supreme Court. *Kondrat*, No. 83-804 (October 26, 1983). The United States Supreme Court denied Kondrat's petition for writ of certiorari, *Kondrat*, ... U.S. ....., 103 S. Ct. 2091, *cert. denied* (1983).

The second action, also alleging refusal to enforce the City's zoning ordinance Chapter 1337.02, named the same defendants who are before the Court in this action. Finding that an action for damages could not be sustained against the Willoughby Officials, the trial court granted their motion for summary judgment. *Kondrat v. Schaefer*, No. 83-CIV-0496 (Lake County C.P., Mar. 15, 1984). The

Common Pleas Court suggested that Kondrat was not without remedy since he could bring a nuisance suit against his neighbor or bring a mandamus action to exact performance. *Id.*

CONCLUSIONS OF LAW

State Claims

A federal court must give the same preclusive effect to a state court judgment as would be given that judgment under the law of the State in which the judgment was rendered. *Migra v. Warren City School Dist. Bd. of Educ.*, ... U.S. ....., 104 S.Ct. 892, 896 (1984); *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Indeed, the Federal Full Faith and Credit Statute, 28 U.S.C. §1738 requires all federal courts to give preclusive effect to State court judgments whenever the courts of the State from which the judgment emerged would do so. *Allen*, 449 U.S. at 96. In its pertinent part, the statute reads:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

As has often been recognized, the doctrine of preclusion[2] relieves parties of the cost and vexation of mul-

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2. In order to reduce confusion inherent in the terms res judicata and collateral estoppel, this opinion adopts the methodology Justice Blackmun employed in *Migra*. "Issue preclusion" refers to the preclusive effect of a judgment in foreclosing relitigation of a matter that has previously been litigated and decided. "Claim Preclusion" refers to the preclusive effect of a judgment in foreclosing relitigation of matters that should have been raised in an earlier suit. *Id.*, at 894 n.1.

tiple lawsuits, conserves judicial resources, and, by preventing inconsistent decisions, encourages reliance on adjudication. *Allen,* 449 U.S. at 96; *Montana v. United States,* 440 U.S. 147, 153-54. In addition, reliance on prior state court adjudication promotes the comity between state and federal courts that has been recognized as a bulwark of the federal system. *Allen,* 449 U.S. at 96. Thus, in the present litigation, the preclusive effect of Kondrat's state court judgment is determined by Ohio law.

Under the Ohio law of issue preclusion, Kondrat is barred from bringing suit on the same cause of action. The principle is that "a final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of the rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *Norwood v. McDonald,* 142 Ohio St. 299, 52 N.E.2d 67 (1943); *see also Trautwein v. Sorgenfrei,* 58 Ohio St.2d 493, 391 N.E.2d 326 (1979) (final judgment estops a party from relitigating the identical issue raised in the prior action). A final judgment, however, does not bar a subsequent action where the causes of action, are not the same even though each relates to the same subject matter. *Norwood,* 142 Ohio St.2d at 299, 52 N.E.2d at 67; *Whitehead v. General Telephone Co.,* 20 Ohio St.2d 108, 254 N.E.2d 10 (1969).

Although the Ohio Supreme Court has demonstrated a tendency to liberalize its preclusion rules, *see, e.g., Johnson's Island, Inc. v. Board of Township Trustees,* 69 Ohio St.2d 241, 431 N.E.2d 672 (1982) *City of Columbus v. Union Cemetery Ass'n.,* 45 Ohio St.2d 47, 341 N.E.2d 299 (1976), the Sixth Circuit in *Federal Deposit Ins. Corp. v.*

Eckhardt, 691 F.2d 245, 248 (1982) found that the Ohio Supreme Court has not demonstrated any tendency to limit the cause of action rule announced in *Norwood*[3]. Thus, following the leading Ohio preclusion case, a claim is not barred when "different proofs are required to sustain the two actions." *Norwood*, 142 Ohio St. at 311, 52 N.E.2d at 73.

Applying these principles to the case before this Court, Kondrat's claims can be divided into those he has previously brought in state court and those federal causes of action being brought for the first time. The claim against the Willoughby Officials for refusal to enforce the local zoning ordinance has already been adjudicated against the identical parties in a state court of competent jurisdiction. The unreversed Summary Judgment against Kondrat represents a final determination of the rights of the parties for the cause of action involved. Since Ohio issue preclusion law bars Kondrat from relitigating a cause of action that has previously been decided, the claim for non-enforcement of the zoning ordinance cannot be brought against the Willoughby Officials in this Court.

Constitutional Claims

Kondrat's federal claims may indeed require different proof and may not be barred under the Ohio law of claim preclusion. This Court need not reach the issue since Kondrat's claims may be dismissed on other grounds. Kondrat claims to have been denied both due process and equal protection. Though the Willoughby Officials have

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3. In *Migra*, ... U.S. ....., 104 S.Ct. at 898-99, Justice Blackmun comments on the "gradual evolution" of Ohio preclusion law but does not determine what the state of today's law is. He writes, "Prudence also dictates that it is the District Court, in the first instance, not this Court, that should interpret Ohio preclusion law and apply it." *Id.*, at 899.

failed to address the equal protection claim, this Court can dismiss a meritless claim. "The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional principles." *Plyler v. Doe*, 457 U.S. 202, 216, *reh'g denied*, ... U.S. ....., 103 S.Ct. 14 (1982). While it has grown to encompass other improper governmental classifications, it provides no cause of action against an individual state actor who arbitrarily seeks to deprive individuals of constitutional rights. Kondrat challenges the Willoughby Officials' actions, not any enactment of the City of Willoughby Hills. Consequently, he does not state a valid equal protection claim.

Likewise, the due process claim is not valid since Kondrat has not pled or proven that state remedies for redressing the wrong are inadequate. This Court has recently had opportunity to thoroughly discuss the line of cases dealing with §1983 damage suits claiming the deprivation of a property interest without procedural due process of law. *Moore v. Walker*, No. C82-1502Y (N.D. Ohio, May 31, 1984). Another examination of *Parratt v. Taylor*, 451 U.S. 527 (1981); *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983); and *Campbell v. Shearer*, 732 F.2d 531 (6th Cir. 1984) is necessary only to note that Kondrat must prove the inadequacy of state law remedies before he can pursue a §1983 action for deprivation of property without due process. Kondrat has failed to make any such showing. *Vicory*, 721 F.2d at 1065-66; *Campbell*, 732 F.2d at 533-34.

The Court recognizes that Kondrat is acting *pro se* and cannot be expected to know all the intricacies of the law. Nevertheless, the state court judge in Kondrat's second action did recommend two possible routes of action that Kondrat could pursue in state court. *Kondrat v. Schaefer*

No. 83-CIV-0497 (Lake County C.P., March 15, 1984). Either a nuisance suit against his neighbor, or a mandamus action to exact performance, or both, are adequate state remedies. In this purely local, individualized property dispute, adequate remedies, if warranted, can and truly should be obtained in state court. To hold otherwise would only make §1983 "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Parratt,* 451 U.S. at 544, quoting *Paul v. Davis,* 424 U.S. 693, 701 (1976).

Equitable Relief

In addition to the Motion for Summary Judgment, the Willoughby Officials seek an injunction barring Kondrat from filing further *pro se* actions without first obtaining leave of this Court. While the equity power of a court to give injunctive relief against vexatious litigation is an ancient one which has been codified in the All Writs Statute, 28 U.S.C. §1651(a), this Court has not been directed to nor has it found any precedent for granting an injunction in a case such as the one before the Court. True, some courts have granted injunctions barring plaintiffs from filing further actions, but in those cases the plaintiffs had filed an uniquely large number of frivolous cases. *See* e.g. *In Re Martin-Trigona,* 573 F.Supp. 1245, 1247 (D. Conn. 1983) (plaintiff had filed at least 250 suits); and *In Re Green,* 669 F.2d 779, 781 (D.C. Cir. 1981) (per curiam) (plaintiff had filed between 600 and 700 suits).

Including another suit pending in this District, Case No. C84-1230, Kondrat has filed four actions relating to the same alleged occurrences. Even though he responded to the Willoughby Officials' Motion for Summary Judgment and Equitable Relief in a frivolous manner, this

Court finds no sufficient grounds on which to grant equitable relief. A District Court's extraordinary powers to grant injunctive relief should be invoked only in extraordinary circumstances. Those circumstances are not present in this action.

CONCLUSION

Kondrat's complaint against the Willoughby Officials for refusing to enforce a Willoughby Hills zoning ordinance cannot be brought in this Court. Following Ohio issue preclusion law, the claim is barred. His equal protection claim is frivolous and must be dismissed. Further, the §1983 denial of due process claim cannot be heard because there are adequate remedies available in state court. Therefore, the Motion for Summary Judgment is granted.

The Motion for Equitable Relief is denied since the Willoughby Officials have not demonstrated sufficient reason for this Court to use its injunctive power.

IT IS SO ORDERED

/s/ ANN ALDRICH
United States District Judge

AFFIDAVIT OF MELVIN G. SCHAEFER

AFFIDAVIT

STATE OF OHIO)
) SS:
COUNTY OF LAKE)

Now comes MELVIN G. SCHAEFER, who after being duly sworn according to law, deposes and says:

(1) That he is the duly qualified, elected and acting Mayor and *ex officio* Director of Public Safety of the City of Willoughby Hills, Ohio;

(2) That neither Affiant nor any other City official has refused at any time to enforce Section 1337.02 of the Willoughby Hills Codified Ordinances by failing to prosecute violators thereof;

(3) That Affiant has not worked in concert with George Kraincic or Barry Byron in refusing to enforce Section 1337.02 of the Willoughby Hills Codified Ordinances;

(4) That duly prescribed standard procedure has been timely followed with respect to all known possible actionable violations of Ord. 1337.02 within the City, and that at the current time no criminal prosecution for violations of Ord. 1337.02 is warranted;

(5) That Affiant is a Defendant in *Kondrat v. Schaefer*, Case No. 83-CIV-0497 (Lake County Common Pleas) and that the Complaint, (attached hereto as Exhibit B),* Answer, (attached hereto as Exhibit C) Plaintiff's Motion for Summary Judgment, (attached hereto as Exhibit D), Defendants' Brief in Reply to Plaintiff's Motion for Sum-

*Exhibits omitted in printing.

mary Judgment (attached hereto as Exhibit E), and the court's judgment entry overruling Plaintiff's Motion (attached hereto as Exhibit F), are true copies of the documents filed in Case No. 83-CIV-0497 and received by Affiant's attorney in the case.

Further Affiant sayeth naught.

/s/ MELVIN G. SCHAEFER
Melvin G. Schaefer

SWORN TO BEFORE ME and subscribed in my presence this 26 day of August, 1983.

/s/ JANET L. BEREWALD
Notary Public

(Jurat Omitted)

AFFIDAVIT OF HAROLD F. ZEVNIK

AFFIDAVIT

January 6, 1987

I, Harold Zevnik, being first duly sworn, deposes and says that I live at 29006 Eddy Road, Willoughby Hills, County of Lake, State of Ohio and have resided at said residence since March 19, 1972.

I further state that I was present in the courtroom of Judge John Manos on the date of September 12, 1986, or thereabouts at a court hearing at which time I heard Barry M. Byron and David Cruckshank testify that they knew of the existance of an illegal operation and nuisance, and that they admitted that it has been in existance for over ten years.

The statements made were in regard to cases involving Robert J. Kondrat.

Respectfully,

/s/ HAROLD F. ZEVNIK
Harold F. Zevnik
29006 Eddy Road
Willoughby Hills, Ohio
44092

State of Ohio
County of Lake

Subscribed and sworn to before me this 6th day of January, 1987.

/s/ HAROLD F. ZEVNIK
6th of January, 1987

/s/ HELEN CULP

(Jurat Omitted)

AFFIDAVIT OF CELESTE ZUCKER

AFFIDAVIT

January 6, 1987

I Celeste Zucker being duly sworn deposes and says that I have lived at 22900 Ivan, Euclid, Ohio, and have resided at said residence since December, 1984. I further state that I was present in the courtroom of Judge John Manos on the dates of August 12, 1986 and September 12, 1986, at which time I heard Barry M. Byron and David Cruikshank testify that they knew of the existence of an illegal operation and nuisance, and that they admitted that it has been in existence for over ten years. The testimony was made in regard to cases involving Robert J. Kondrat.

Respectfully,

/s/ CELESTE A. ZUCKER
Celeste Zucker
22900 Ivan Ave.
Euclid, Ohio 44123

State of Ohio
County of Cuyahoga

Subscribed and sworn to before me this 6 day of January, 1987

/s/ MICHAEL A. GLODICH
Notary Public

(Jurat Omitted)

CASE NUMBER 86 CIV 0207 IN THE COURT OF COMMON PLEAS, LAKE COUNTY, OHIO

(Filed February 12, 1986)

Case No. 86 CIV 0207

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

THE CITY OF WILLOUGHBY HILLS,
Plaintiff,

v.

DAVID A. JOHNSON,

and

ARTHUR D. JOHNSON,

and

ZEBRA COMPANY, An Unincorporated Association,
Defendants.

COMPLAINT IN EQUITY

THE PARTIES

1. Plaintiff is a municipal corporation organized and existing under the laws of the State of Ohio.

2. Zebra, Inc. and/or Zebra Company is a business association holding itself out as an Ohio corporation which association holds title to the real estate located at 29137 and 29139 Chardon Road, Willoughby Hills, Ohio.

3. Defendants David A. Johnson and Arthur D. Johnson are individuals who claim an interest in the association

Zebra Company and/or Zebra, Inc. and/or claim direct ownership of the above-described real estate.

4. Defendant David A. Johnson claims and represents in Case No. C85-3883, U.S. District Court, N.D. Ohio, *Johnson v. Willoughby Hills, et al.* that:

> "Plaintiff was the owner and operator of a vehicle repair garage situated on the premises known as 29137 Chardon Road."

THE PROPERTY

5. The two parcels of property known as 29137 and 29139 Chardon Road are being used for the storage of unlicensed vehicles.

6. The two parcels of property, being 29137 and 29139 Chardon Road, are being used for the purpose of conducting an automobile repair garage.

7. That Defendants have collected, stored, discarded, placed or deposited or permitted the collection, storage, discarding, placing, and/or depositing of junk motor vehicles; and/or parts of motor vehicles, litter, noisome substances and debris on the aforesaid parcels of land.

8. The aforementioned property is, and has been, zoned residential use.

9. Plaintiff has no adequate remedy at law.

COUNT ONE

10. Plaintiff re-alleges paragraphs 1 through 9 as if more fully rewritten herein.

11. Defendants are operating or allowing the operation of a commercial establishment, i.e., an automobile repair

business, upon said premises in violation of the Willoughby Hills Zoning Code.

12. Plaintiff is entitled to an injunction against commercial activities of Defendants pursuant to §713.13, Ohio Revised Code.

COUNT TWO

13. Plaintiff re-alleges paragraphs 1 through 12 as if more fully rewritten herein.

14. This action is brought pursuant to §715.44, Ohio Revised Code and Rule 65, Ohio Rules of Civil Procedure.

15. That the aforesaid actions of Defendants are in violation of §521.10 of the Codified Ordinances of the City of Willoughby Hills and Section 4513.65; 3767.13, 3767.32, Ohio Revised Code.

16. The presence of the aforesaid material has created a nuisance and caused annoyance to neighboring residents.

WHEREFORE, Plaintiff prays:

1. This Court to issue a preliminary and permanent injunction enjoining the Defendants from operating a commercial establishment and/or enterprise in a residential zone in violation of the Willoughby Hills City Zoning Code.

2. The Defendants be ordered to abate the nuisance, and this Court to issue a preliminary and permanent injunction enjoining Defendants from maintaining the nuisance and violating the Codified Ordinance of the City of Willoughby Hills and Revised Code of the State of Ohio.

3. That the penalties provided in §510.10 of the Codified Ordinances of the City of Willoughby Hills; R.C.

§715.44; R.C. §3767.99 be imposed in such amount as this Court deems appropriate and sufficient.

4. For costs of this action and for such other and further relief as this Court may deem proper.

/s/ BARRY M. BYRON
DAVID E. CRUIKSHANK
BYRON AND CANTOR Co., L.P.A.
36100 Euclid Ave./Suite 330
Willoughby, Ohio 44094-4492
(216) 951-2303
Attorneys for Plaintiff

NOTICE

Please take Notice that upon the Complaint attached hereto, the City of Willoughby Hills will move the Court at Room 5, Lake County Court of Common Pleas Court House, Painesville, Ohio on March 5 2:00 PM, 1986, or as soon thereafter as counsel can be heard for an order pursuant to Rule 65(B), Ohio Rules of Civil Procedure enjoining and restraining the Defendants during the pendency of this action from operating or allowing the operating of establishments or enterprises in violation of R.C. 715.44; R.C. 3767.13; R.C. 3767.32; R.C. 4513.65; R.C. 713.13 and §521.10, Willoughby Hills Codified Ordinances.

/s/ BARRY M. BYRON
DAVID E. CRUIKSHANK
BYRON AND CANTOR Co., L.P.A.
36100 Euclid Ave./Suite 330
Willoughby, Ohio 44094-4492
(216) 951-2303
Attorneys for Plaintiff

Supreme Court, U.S.
FILED
JUN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1795

In the Supreme Court of the United States

October Term, 1986

ROBERT J. KONDRAT,
Petitioner,

vs.

BARRY M. BYRON, MELVIN G. SCHAEFER AND GEORGE KRAINCIC,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID E. CRUIKSHANK, *Counsel of Record*
BYRON AND RYAN CO., L.P.A.
36100 Euclid Avenue #330
Willoughby, Ohio 44094-4492
(216) 951-2303
Attorney for Respondents

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED

Is an award of attorneys' fees to defendants proper where a *pro se* plaintiff files the same frivolous action in seven separate lawsuits in both the federal and state courts in which all seven cases are dismissed and the dismissals affirmed on appeal?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

No. 86-1795

In the Supreme Court of the United States

October Term, 1986

ROBERT J. KONDRAT,

Petitioner,

VS.

BARRY M. BYRON, MELVIN G. SCHAEFER AND GEORGE KRAINCIC,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CASE AND FACTS

On July 21, 1983, Plaintiff-Petitioner filed suit in the United States District Court, Northern District of Ohio (Eastern Division), Case No. C83-2953, against Defendants-Respondents, Barry M. Byron, Melvin G. Schaefer, and George Kraincic.

Petitioner alleged that the three Respondents failed to enforce Codified Zoning Ordinance Section 1337.02 of the City of Willoughby Hills, Ohio, which caused Petitioner's property to be devalued. Petitioner sought Three Hundred Thousand Dollars ($300,000.00) in damages for alleged violations of the Fourteenth Amendment's due process and equal protection clauses.

On July 9, 1984, Judge Ann Aldrich issued a comprehensive memorandum and order firmly explaining that Petitioner had brought this same action on two prior occasions and that Petitioner had appropriate state court remedies available. Judge Aldrich *dismissed* the action (Appendix to Petition, pp. A6-A15).

The July 9, 1984 order was appealed and affirmed by the United States Court of Appeals, Sixth Circuit, on April 17, 1985, being Case No. 84-3624 (Appendix, p. A1).

As stated above, this was not the first time that Petitioner brought an action against the City of Willoughby Hills and its officials to enforce the aforementioned zoning ordinance and recover damages.

Judge Aldrich, in her July 9, 1984 memorandum and order discussed Petitioner's prior frivolous actions, as follows:

> "In fact, this is the third in a series of related cases. The first, brought in the Court of Common Pleas of Lake County, *Kondrat v. City of Willoughby Hills,* No. 80-CIV-1263 (Jan. 22, 1982) named the City of Willoughby Hills as defendant. Finding governmental immunity, no actionable violation of the zoning ordinance, no evidence of property devaluation for the period of 1976 to 1979, and no genuine issue for trial, the trial court granted the City's motion for summary judgment. On appeal, Kondrat chose to argue that the judicial officer who assigned his case was biased. The State Court of Appeals found no support for his argument and upheld the trial court's interpretation of the law, *Kondrat,* No. CA 0-069 [sic] (Aug. 30, 1982). Kondrat's motion to certify the record was overruled *sua sponte* by the Ohio Supreme Court. *Kondrat,* No. 83-804 (October 26, 1983). The United States Supreme Court denied Kondrat's petition for writ of certiorari, *Kondrat,* ..... U.S. ....., 103 S.Ct. 2091, *cert. denied* (1983).

> The second action, also alleging refusal to enforce the City's zoning ordinance Chapter 1337.02, named the same defendants who are before the Court in this action. Finding that an action for damages could not be sustained against the Willoughby [Hills] Officials, the trial court granted their motion for summary judgment. *Kondrat v. Schaefer,* No. 83-CIV-0496 (Lake County C.P., Mar. 15, 1984). The Common Pleas Court suggested that Kondrat was not without remedy since he could bring a nuisance suit against his neighbor or bring a mandamus action to exact performance."

Subsequent to Judge Aldrich's trial court decision Petitioner filed four (4) more separate lawsuits based upon the same or similar issues as the prior three (3) frivolous actions. The cases are cited as follows:

(1) *Kondrat v. Byron,* United States District Court, Northern District (Eastern Div.), Case No. C84-1230

(2) *Kondrat v. Aldrich,* United States District Court, Northern District (Eastern Div.), Case No. C85-125

(3) *Kondrat v. Byron,* United States District Court, Northern District (Eastern Div.), Case No. C86-2384

(4) *Kondrat v. Byron,* United States District Court, Northern District (Eastern Div.), Case No. C86-4912

All of the aforementioned actions were dismissed in favor of the Respondents. Case No. C84-1230 was appealed and affirmed by the United States Court of Appeals, Sixth Circuit, Case No. 84-3702; Case No. C85-125 was also ap-

pealed and affirmed by the Sixth Circuit Court of Appeals in Case No. 85-3129. The appeal time on Case No. C86-4912 has not yet run, but it is fairly safe to say that Petitioner will appeal that decision. Case No. C86-2384 was voluntarily dismissed by Petitioner, however, he filed the exact same action in Case No. C86-4912.

In fact, the attached list of lawsuits filed by Petitioner clearly demonstrates the disrespect Petitioner has for the judicial system and for these Respondents (Appendix, p. A3). To date, Petitioner has filed at least eighty (80) lawsuits in both the federal and state courts (Appendix, p. A3). Fifty-four (54) of these lawsuits were filed against the City of Willoughby Hills and/or its officials (Appendix, pp. A3-A7).

On July 19, 1984, Respondents herein filed their motion for an award of attorney fees pursuant to Title 42 U.S.C. 1988 in Case No. C83-2953.

Judge Ann Aldrich issued an order on June 25, 1985, which held that Respondents were entitled to attorney fees in the sum of Three Thousand Six Hundred Two and 40/100 Dollars ($3,602.40) (Appendix to Petition, pp. A4-A5).

On July 5, 1985, Petitioner filed his notice of appeal from the June 25, 1985 order claiming that the lower court had acted in bad faith and that counsel was not entitled to fees. The United States Court of Appeals, Sixth Circuit, affirmed that decision on February 23, 1987 (Appendix to Petition, pp. A1-A3). The Appellate Court, in their opinion, stated, the following:

> "In the instant case, the district court awarded attorney's fees to the defendants after finding that Kondrat's action was frivolous. This finding is amply

supported by the record. This suit marked the third time that Kondrat had brought suit on this subject matter. On every occasion, the defendants prevailed. Although we do realize that Kondrat has been acting *pro se* and 'attorney's fees should rarely be awarded against such plaintiffs,' *Hughes v. Rowe,* 449 U.S. 5, 15 (1980), there comes a point when even the uncounselled plaintiff who persistently brings frivolous and meritless suits must be held accountable. Kondrat has reached this point.

Therefore, the judgment of the district court is AFFIRMED."

Petitioner has brought this eightieth (80th) frivolous action based upon the February 23, 1987 Opinion of the United States Court of Appeals for the Sixth Circuit to this Court. Petitioner has requested that the Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to examine the issues he has raised.

ARGUMENT

I. ATTORNEYS' FEES MAY BE ASSESSED AGAINST A PLAINTIFF WHEN HIS CLAIMS ARE FRIVOLOUS, UNREASONABLE OR WITHOUT FOUNDATION.

The Respondents were clearly the prevailing party in Case No. C83-2953, and are therefore entitled to an award of attorney fees pursuant to 42 U.S.C. §1988. That section provides that "the Court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." This Court has held that when the prevailing party is a de-

fendant, the district court may assess fees against the plaintiff only upon a finding "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though there was an absence of subjective bad faith." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421, 90 S. Ct. 694, 700, 54 L. Ed. 2d 648 (1978).

The *Christiansburg* decision, *supra,* determined that Congress intended to provide some protections to prevailing defendants. Citing *Grubb v. Butz,* 548 F.2d 973, 975 (1976), this Court, in *Christiansburg,* emphasized the significance of protecting defendants from burdensome litigation:

> ". . . But, second and equally important, Congress intended to deter the bringing of lawsuits without foundation by providing that the prevailing party—be it plaintiff or defendant—could obtain legal fees."

While the Supreme Court in *Christiansburg, supra,* addressed the question of the standard applicable to the attorneys fee provisions of Section 706(K) of Title VII of the Civil Rights Act of 1964, the provisions are virtually identical to those of Section 1988 at issue in this case.

In *Hughes v. Rowe,* 449 U.S. 5, 14-15, 101 S. Ct. 173, 178-179, 66 L. Ed. 2d 163 (1980) (per curiam), the Court applied the *Christiansburg* test in actions brought pursuant to Section 1983, although the plaintiff in *Hughes* was an uncounselled prisoner, this Court's language is clear:

> "In *Christiansburg Garment Co. v. EEOC,* 434 U.S. (1978), we held that the defendant in an action brought under Title VII of the Civil Rights Act of 1964 may recover attorney's fees from the plaintiff

> only if the District Court finds 'that the plaintiff's actions was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.' *Id.* at 421. [98 S.Ct. at 700]. Although arguably a different standard might be applied in a civil rights action under 42 U.S.C. §1983, we can perceive no reason for applying a less stringent standard. The plaintiff's action must be meritless in the sense that it is groundless or without foundation . . ."

Id. 449 U.S. at 14, 101 S. Ct. at 178.

The application of the *Christiansburg* standard for the award of attorney fees to defendants under Section 1988 has been adopted by many courts. *Campbell v. Cook,* 706 F.2d 1084, 1086 (10th Cir. 1983); *Weich v. City of Berlin,* 673 F.2d 192 (7th Cir. 1982); *Reichenberger v. Pritchard,* 660 F.2d 280 (7th Cir. 1981).

Both the District Court herein and the Sixth Circuit Court of Appeals correctly determined that Petitioner's action was frivolous. The District Court specifically noted that this same action was filed by Petitioner three separate times in both the federal and state courts.

The City of Willoughby Hills and its officials have been required to defend each case and the City has expended thousands of dollars in defense of these lawsuits. Municipal funds have thus been channeled into a completely non-productive and frustrating activity.

As stated in the facts, to date Petitioner has filed eighty (80) lawsuits against the City of Willoughby Hills and/or its officials, among others (Appendix, p. A3).

On every occasion, except for those cases currently pending, *the Respondents and other defendants have prevailed!*

It should be emphasized that an award of attorney fees for the defense of multiple, frivolous litigation has previously been affirmed in *Tonti v. Petropoulus*, 656 F.2d 212 (6th Cir. 1981).

The decision to award attorneys' fees is committed to the discretion of the trial judge. 42 U.S.C. §1988; *Christiansburg, supra.*

The trial court herein sought fit to apply the *Christiansburg* standard. Judge Aldrich determined that petitioner's action was clearly frivolous. The Appellate Court affirmed the District Court's order and utilized deterrent language in its order. Both courts determined that petitioner must be held accountable for the continued filing of frivolous and meritless suits.

The standard of appellate review of a district court's award of attorneys' fees to a prevailing party under §1988 is whether the trial court abused its discretion in making or denying the award. *Reichenberger v. Pritchard*, 660 F.2d 280, 288 (7th Cir. 1981).

The Seventh Circuit Court of Appeals in *Reichenberger, supra*, has outlined several factors for an appellate court to aid in determining whether the trial court properly exercised its discretion.

> "In seeking to determine whether a suit is frivolous, unreasonable or groundless, courts have focused on several factors. Among those considered are whether the issue is one of first impression requiring judicial resolution; whether the controversy is sufficiently based upon a real threat of injury to plaintiff; whether the trial court has made a finding that the suit was frivolous under the *Christiansburg* guidelines, and whether the record would support such a finding."

The Sixth Circuit Court of Appeals, followed these stringent guidelines and affirmed the trial court's decision. It is clear that there was absolutely no abuse of discretion on behalf of the trial court in granting said fees. The award of attorneys' fees is within the court's "inherent equitable power." *Hall v. Cole,* 412 U.S. 1, 5, 93 S. Ct. 1943, 1946, 36 L. Ed. 2d 702 (1973).

Therefore, the award of attorney fees to Respondents was proper due to the frivolous, unreasonable and groundless claims filed by Petitioner.

CONCLUSION

Therefore, based on the foregoing and the attached appendix, Respondents, Barry M. Byron, Melvin G. Schaefer and George Kraincic respectfully request that the petition for a writ of certiorari filed by Robert J. Kondrat be denied.

Respectfully submitted,

DAVID E. CRUIKSHANK, *Counsel of Record*
BYRON AND RYAN CO., L.P.A.
36100 Euclid Avenue #330
Willoughby, Ohio 44094-4492
(216) 951-2303
Attorney for Respondents

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed April 17, 1985)

No. 84-3624

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT J. KONDRAT,
Plaintiff-Appellant,

v.

BARRY M. BYRON; MELVIN G. SCHAEFER; GEORGE KRAINCIC,
Defendants-Appellees.

ORDER

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.]

BEFORE: KENNEDY and CONTIE, *Circuit Judges;* and EDWARDS, *Senior Circuit Judge*

Kondrat appeals pro se from the district court's grant of summary judgment in favor of the defendants in this civil rights case. This appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After an examination of the record and the briefs, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

Kondrat is a resident of Willoughby Hills, Ohio. The defendants are the mayor, a city councilman, and the law director of the city. Kondrat's complaint alleges that the defendants caused the value of his property to decline by failing to prevent a neighbor's property from becoming an eyesore. Kondrat raised state law, due process, and equal protection claims.

The district court held that Kondrat's state law claim was barred by the doctrine of res judicata. We agree with this conclusion, and we also hold that Kondrat's entire complaint was barred by res judicata. The Supreme Court has held that a federal court under §1983 must apply the state law of res judicata. *Migra v. Warren City School Dt. Bd. of Ed.*, ... U.S. ....., 104 S.Ct. 892, 898 (1984). The state of Ohio applies a broad doctrine of res judicata that bars any issue that could have been raised in an earlier suit. *Johnson's Island, Inc. v. Bd. of Twp. Trustees*, 69 Ohio St.2d 241, 244 (1982). Therefore, the earlier suit that Kondrat filed in state court against these same defendants on the state law claim would also bar his federal claims under §1983.

Even if his claims were not barred by res judicata, the judgment of the district court would still be affirmed. The only issue which Kondrat raises on appeal is the equal protection issue. The enforcement of an otherwise valid ordinance only violates the equal protection clause if the ordinance is applied or enforced with a discriminatory intent or purpose. *Scudder v. Town of Greendale*, 704 F.2d 999, 1002 (7th Cir. 1983). This intent or purpose must be based on an unjustifiable standard such as race, religion, or other arbitrary classification. *Teague v. Alexander*, 662 F.2d 79, 83 (D.C. Cir. 1981).

Here Kondrat's complaint contains only conclusory allegations that the defendants acted with a discriminatory

intent and contains no allegations that the actions were based on an unjustifiable standard such as race, religion, or other arbitrary classification. So there is no valid equal protection clause issue here.

The judgment of the district court is affirmed under Rule 9(d)(3), Rules of the Sixth Circuit, because the issues are not substantial and do not require oral argument.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

KONDRAT CASES

1. *Kondrat v. Mitrovich, et al.*, Lake County Common Pleas Court, Case No. 77-CIV-917
2. *Kondrat v. Mitrovich, et al.*, Eleventh District Court of Appeals, Case No. CA7-093
3. *Kondrat v. Mitrovich, et al.*, Eleventh District Court of Appeals, Case No. CA7-073
4. *Kondrat v. Mitrovich, et al.*, Eleventh District Court of Appeals, Case No. CA9-185
5. *Kondrat v. Mitrovich, et al.*, Ohio Supreme Court, Case No. 79-1502
6. *Kondrat v. Mitrovich, et al.*, United States Supreme Court, Case No. 79-1775
7. *Kondrat v. Byron, et al.*, Lake County Common Pleas Court, Case No. 77-CIV-918
8. *Kondrat v. Byron, et al.*, Eleventh District Court of Appeals, Case No. CA8-174

9. *Kondrat v. Byron, et al.*, Case No. CA7-047, Eleventh District Court of Appeals, Case No. CA7-047

10. *Kondrat v. Byron, et al.*, Eleventh District Court of Appeals, Case No. CA6-292

11. *Kondrat v. Byron, et al.*, Eleventh District Court of Appeals, Case No. CA8-134

12. *Kondrat v. Byron, et al.*, Eleventh District Court of Appeals, Case No. CA10-001

13. *Kondrat v. Byron, et al.*, Ohio Supreme Court, Case No. 84-1540

14. *Kondrat v. Byron, et al.*, Ohio Supreme Court, Case No. 83-83

15. *Kondrat v. Byron, et al.*, United States Supreme Court, Case No. 79-1710

16. *Kondrat v. O'Ryan*, Lake County Common Pleas Court, Case No. 79-CIV-87

17. *Kondrat v. O'Ryan*, Eleventh District Court of Appeals, Case No. CA8-107

18. *Kondrat v. O'Ryan*, Eleventh District Court of Appeals, Case No. CA8-006

19. *Kondrat v. O'Ryan*, Ohio Supreme Court, Case No. 80-738

20. *Kondrat v. O'Ryan*, Ohio Supreme Court, Case No. 81-802

21. *Kondrat v. City of Willoughby Hills*, Lake County Common Pleas Court, Case No. 80-CIV-1263

22. *Kondrat v. City of Willoughby Hills*, Eleventh District Court of Appeals, Case No. CA9-069

23. *Kondrat v. City of Willoughby Hills,* Ohio Supreme Court, Case No. 82-1415

24. *Kondrat v. City of Willoughby Hills,* Ohio Supreme Court, Case No. 83-804

25. *Kondrat v. City of Willoughby Hills,* United States Supreme Court, Case No. 82-1115

26. *Kondrat v. Byron,* Lake County Common Pleas Court, Case No. 81-CIV-956

27. *Kondrat v. Byron,* Eleventh District Court of Appeals, Case No. CA9-179

28. *Kondrat v. Byron,* Ohio Supreme Court, Case No. .....

29. *Kondrat v. Schaefer, et al.,* Lake County Common Pleas Court, Case No. 83-CIV-497

30. *Kondrat v. Schaefer, et al.,* Eleventh District Court of Appeals, Case No. CA11-163

31. *Kondrat v. Schaefer, et al.,* Eleventh District Court of Appeals, Case No. CA10-147

32. *Kondrat v. Schaefer,* Lake County Common Pleas Court, Case No. 84-CIV-1231

33. *Kondrat v. City of Willoughby Hills,* United States District Court (Eastern Division), Case No. C77-464

34. *Kondrat v. City of Willoughby Hills,* United States Court of Appeals, Sixth Circuit, Case No. 77-3405

35. *Kondrat v. Byron,* United States District Court, Northern District (Eastern Division), Case No. C83-2953

36. *Kondrat v. Byron,* United States Court of Appeals, Sixth Circuit, Case No. 84-3624

37. *Kondrat v. Byron,* United States Court of Appeals, Sixth Circuit, Case No. 85-3530

38. *Kondrat v. Byron,* United States District Court, Northern District (Eastern Division), Case No. C84-1230

39 *Kondrat v. City of Willoughby Hills,* United States Supreme Court, Case No. 82-1559

40. *Kondrat v. Martinet,* Lake County Common Pleas Court, Case No. 79-CIV-932

41. *Kondrat v. Martinet,* Eleventh District Court of Appeals, Case No. CA9-22

42. *Kondrat v. Martinet,* Ohio Supreme Court, Case No. 82-1655

43. *Kondrat v. Martinet,* United States Supreme Court, Case No. 82-1411

44. *Kondrat v. Byron, et al.,* Lake County Common Pleas Court, Case No. 85-CIV-0061

45. *Kondrat v. Byron, et al.,* Eleventh District Court of Appeals, Case No. CA11-77

46. *Kondrat v. Byron, et al.,* Ohio Supreme Court, Case No. .....

47. *Kondrat v. Byron, et al.,* Lake County Common Pleas Court, Case No. 85-CIV-1377

48. *Kondrat v. Byron, et al.,* Lake County Common Pleas Court, Case No. 87-CIV-355

49. *Kondrat v. Schaefer,* Lake County Common Pleas Court, Case No. 87-CIV-362

50. *Kondrat v. Byron,* United States District Court, Northern District (Eastern Division), Case C86-2384

51. *Kondrat v. Byron,* United States District Court, Northern District (Eastern Division), Case No. C86-4912

52. *Kondrat v. Byron,* United States Supreme Court, Case No. 79-1710

53. *Kondrat v. Byron, et al.,* Ohio Supreme Court, Case No. 87-590

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No. 86-1795

In the Supreme Court of the United States

October Term, 1986

ROBERT J. KONDRAT,
Petitioner,

vs.

BARRY M. BYRON, MELVIN G. SCHAEFER
AND GEORGE KRAINCIC,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Upon a review of the Respondents' Brief in Opposition, it is apparent that clarification of the Respondents' interpretation of the facts and relevant issues in the instant case is necessary.

ARGUMENT

I. The Respondents have argued on page 5 of Respondents' Brief in Opposition that Petitioner has brought his eightieth (80) frivolous action. Petitioner argues that if this be true, then there is something seriously wrong with a profession, and with the judicial system of this country.

The question is asked, why must one person in this nation be required to go to such lengths in search of justice? Especially when the litigation stemmed from one event, the right to petition the government for a redress of grievances. Petitioner's grievance was the non-enforcement of the laws.

Respondents denied their non-enforcement of the laws, and as retribution for Petitioner's First Amendment exercise, fabricated criminal activity against Petitioner. At a trial, the Respondents scheme was exposed and the case dismissed against Petitioner.

The Respondents' denials of not enforcing the laws were the cause for Petitioner to seek recourse through the courts. Ten (10) years after the Petitioner's exercise of the First Amendment and the litigation that followed, the Respondents admitted to the truth of their non-enforcement of the laws.

Now the Respondents are claiming that the Petitioner was responsible for some eighty (80) frivolous suits. The fact is, had the Respondents enforced the laws, and not denied the existence of an illegal operation, there would not have been Petitioner's exercise of the First Amendment and any subsequent litigation. If there are eighty (80) suits as the Respondents contend, then they have nobody to blame but themselves. It was the Respondents who, through their denials and non-enforcement of the law were the cause for the very litigation that they are now attempting to use as a defense in the Petition.

II. Respondents have argued on page 7 that they have prevailed in the eighty (80) suits on every occasion except for pending cases. Petitioner argues that the Respondents have prevailed only because of the following:

1. Because the Petitioner had to litigate without the aid of adequate legal counsel.
2. Because the Respondents committed continuous perjury that deceived the courts for over ten (10) years.
3. Because no court would grant a trial or consider Petitioner's evidence in each action that showed more than sufficient information in the record to conclude that Petitioner had a non-frivolous basis for filing suit, and that Petitioner was the prevailing party.
4. Because a Respondent had once worked in the federal court system and enjoyed treatment as a former employee.
5. Because a Respondent was influential in a political party and enjoyed special treatment from this political arena which included members from the court.
6. Because many issues dealt with civil and human rights which the courts elected to suppress rather than expose the actions of governmental officials taken against the people of this country. The courts were joined in this endeavor by the federal government.
7. Because of deliberate obstruction of justice by the court.
8. Because of political patronage that saw a former state chief justice lend support by ruling that there were no constitutional questions, including the *Miranda* warning.
9. Because of the practice of entrapment by the court.
10. Because the court permitted the submission of false evidence.

The above are but some of the reasons why the Respondents have prevailed. With odds like that, what more could be expected? The linking of each action, the issue and decision, together with the facts, precludes a presentation due to the space permitted by the Reply Brief. However, when all hooked together they do not present a rosy picture for certain factions.

The courts attempted to rescue their own. As litigation continued, the life preserver was tossed. In doing so, the courts themselves became enmeshed and sank deeper each time. Now the courts are at a point of no return where they don't dare render a decision in favor of the Petitioner. For like a row of dominos, one favorable decision would topple the whole pile. In some ways, the Petitioner can only feel sorry for the predicament in which they find themselves. Hopefully though, some good may evolve that will be of benefit to all Americans.

III. Respondents have argued on page 3 that Petitioner has filed 4 separate lawsuits based upon the same or similar issues as the prior 3 frivolous actions. Petitioner would like to clarify the Respondents interpretation of the facts.

Cases C86-2384 (item #3) and C86-4912 (item #4) are one and the same. Case number C86-2384 was dismissed by Petitioner after learning that the Respondents had confessed to having knowledge of the illegal operation for over ten (10) years, and that the Respondents were taking action to enforce the law by prohibiting its operation. However, when these good intentions did not materialize due to the intervention of a federal judge that prohibited the injunction from being litigated, the Petitioner reopened the same case. The issues in both cases were identical, the freedoms of domestic tranquility,

justice, life, liberty and the right to live in peace. Petitioner had been shot at, neighbors have been terrorized, and a guest of Petitioner was abducted and assaulted. These issues are not frivolous matters.

In case number C84-1230 (item 2) the issue was conspiring to defraud. In case number C85-125 (item 1) the issue was a deprival of due process and equal protection of the laws. In case number 83-CIV-0497 (page 3) the issue was for the *second* property devaluation as a result of non-enforcement of the law. In case number 80-CIV-1263 (page 2) the issue was for the *first* property devaluation due to non-enforcement of the law. With the exception of the same case that was filed twice, and with the exception of the two property devaluations, the issues in all cases are not only different, but are also not frivolous.

The use of the word "frivolous" by the Respondents and the courts is convenient when no other defense can be mustered and the courts can find an easy way out for the conclusion of litigation. It would appear that the use of this word by the Respondents in their argument is an admission of defeat.

IV. Respondents have argued on page 4 that the lawsuits filed by Petitioner clearly demonstrate the disrespect Petitioner has for the judicial system and for these Respondents. Petitioner argues that he has no disrespect for the judiciary, the Respondents or anyone else. The Petitioner has called a spade a spade. If the Respondents want to interpret this as disrepect, so be it.

It was not the Petitioner who fabricated crimes, lied in a court of law, or was the cause of some eighty (80) lawsuits. It would appear as though it was the Respondents and certain factions of the judiciary that have been disrespectful, not only to the Petitioner, but to all Americans.

CONCLUSION

The Petitioner never envisioned that obtaining justice could be so difficult in our system of jurisprudence. Due to the fact that the fundamentals of right and wrong have taken a backseat to special interests and commercialism, little can be expected in the way of justice. It's no wonder that the legal profession and the courts are held in such low esteem by the public.

Whether this court is favorable or unfavorable to the Petitioner is of little concern to one individual. The fact that after more than ten (10) years of litigation that was thrust upon the Petitioner by others, it is apparent that there is little, if any, consideration by the judiciary for the supreme law of the land, the U.S. Constitution. This is what disturbs the Petitioner more than anything else.

This court is in a position to bring back on course a judiciary that has strayed badly from the basics set forth by the Constitution. The Petitioner does not ask that it be done with this Petition. It will take more than one case to reestablish the integrity of a system that is now looked upon with suspicion.

As a pro se litigant for over ten (10) years, the Petitioner has been closer to the judicial system than the average person. The experience has been an eye-opener. It is unfortunate that everyone can't experience what Petitioner has experienced. A better and stronger government would result. It is the intention of the Petitioner to convey this to this court, hoping that it will listen to the thoughts of one citizen who has spent so much time in quest of justice, and who was able to gain a good insight into the functioning of a profession and the court system. There are many inequities that need attention. If not

corrected, future generations will be at the mercy of the injustices to which Petitioner was subjected.

The Petitioner Robert J. Kondrat respectfully prays that this court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to examine the important issues raised.

Respectfully submitted,

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